No. 12557

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DOROTHY BRAY,

Appellant,

vs.

ALEXANDER GEORGE PECK,

Appellee.

APPELLEE'S BRIEF.

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Statement of the Case.

As appellant points out in her Statement of the Case, the premises in question were owned in 1942 by Ralph C. Gilbert who was renting the structure for $45.00 per month. In 1946 the property was purchased by Robert C. Chambers who indicated to the then Office of Price Administration that he was operating the premises as a hotel. In the fall of 1947 the defendant entered into an agreement to purchase the property from Mr. Chambers and during a period of about two months operated the premises in close conjunction with Mr. Chambers. In May of 1948 the lease involved in this action was executed between the plaintiff as lessee and the defendant as lessor.

The respects in which appellant's statement of the case do not disclose the evidence which establishes the defense and requires the judgment entered by the court below will be pointed out and discussed in the development of the argument.

ARGUMENT.

I.

The Findings of Fact Require the Conclusion That the Premises Were Decontrolled by the Housing and Rent Act of 1947.

Finding No. 3 recites that in 1946 Robert C. Chambers registered the entire premises as a hotel under the name Rilla Hotel. Finding No. 4 finds that the defendant upon acquiring the property *continued* to operate said premises as the Rilla Hotel and goes on to find that the defendant provided the usual hotel type services.

These findings were based upon substantial evidence. Mr. Chambers in 1946 had registered the premises as a hotel [Defendant's Exhibit A]. During Chambers' ownership the Los Angeles City Telephone Directory contained a listing of the telephone under the name "Rilla Hotel" which was continued during defendant's ownership [Tr. Vol. II, p. 87, line 13, to p. 88, line 3]. Mr. Chambers had stated to Mr. Peck in October of 1947 that "everything was decontrolled by the O. P. A." [Tr. Vol. II, p. 73, lines 6 and 7]. The property was given over to Mr. Peck by Mr. Chambers as the Rilla Hotel and premises [Tr. Vol. II, p. 66, lines 21 and 22]. For two or three months during the period the property was in escrow from October, 1947, Chambers and the defendant operated the property together [Tr. Vol. II, p. 85, line 23, to p. 86, line 4].

The foregoing evidence required the court to draw the inference that defendant Peck continued to operate the property as a hotel in the same manner that his predecessor Chambers operated it and that Chambers so operated it from November, 1946, when he registered it with the O. P. A. as a hotel.

Appellant must concede that if the occupants of the various rooms were "provided" with customary hotel services then the entire premises was exempt as a hotel. As pointed out by the appellant, Controlled Housing Rent Regulations, Section 825.1 (b) (iv) (b), 12 F. R. 4331, provided that entire structures where twenty-five or less rooms were rented or offered for rent and all of the accommodations in such structures were exempt or decontrolled are themselves exempt. The question then becomes what is meant by the term "to whom were provided customary hotel services" within the meaning of the regulation.

The appellant argues that since the occupants of the quarters above the garage did not receive all of the services which the occupants of the rooms within the main building received the premises could not be exempt as a hotel because not *all* of the occupants were *provided* with such services. This very question was considered by the United States District Court for the District of Minnesota in *Woods v. Benson Hotel Court* (1948), 81 F. Supp. 46. The units in the premises there involved were occupied by permanent guests all of whom had kitchen and dining room accommodations. Out of 190 units only 66 were completely furnished, 115 were partially furnished, 31 had linen service and 7 had maid service. The remaining units did not have furniture or any service, but the management was prepared to give them furniture, linen, and maid service at extra cost. The court held that in order to be a decontrolled hotel it was not necessary that the tenants actually *receive* all of the services. It is sufficient, said the court, that the services are available either with or without extra costs.

II.

The Court's Finding That the Property Was Known as a Hotel Is Supported by the Evidence.

Appellant apparently contends that to be sufficient the court's finding must follow the exact language of the statute. Respondent knows of no such rule.

To the contrary the rule is that the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon. Whenever from the facts found by it other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court and upon an appeal from that judgment the appellate court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering such judgment.

Goldberg v. List (1938), 11 Cal. 2d 389;
Leff v. Knewbow (1941), 47 Cal. App. 2d 360.

Applying this rule of construction it is at once seen that when the court finds that in 1946 Chambers registered the premises as the "Rilla Hotel" (Finding No. 3); that upon acquiring said property the defendant continued to operate the premises as the Rilla Hotel (Finding No. 4); and that during such operations by the defendant the premises were known as "Rilla Hotel" and were so listed in the telephone directory and on the records of the office of the housing expediter (Finding No. 5); and these findings were made in the light of such evidence, for example, as the evidence that Mr. Chambers had the premises listed in the telephone directory as "Rilla Hotel," there can be no question but what the court below has made the necessary findings upon

which to base its conclusion that the property was exempted from rent control as a hotel.

Some of the evidence supporting and requiring these findings is pointed out by appellant herself and need not be repeated. In addition the record is replete with evidence of the hotel type services which were furnished by the defendants and inferentially by his predecessor Mr. Chambers. The guests were provided with daily cleaning and maid service supplied by the defendant and his wife, were supplied with daily change of linens, and with telephone service.

Appellant urges that the presence of cooking facilities removed it from the category of a hotel. Such an argument was resolved adversely to the position of the appellant by the Court of Appeals for the Eighth Circuit in *Woods v. Western Holding Corp.,* 173 F. 2d 655. In this case the court pointed out that there are three types of hotels, the commercial or transient business hotel, the apartment hotel, and the family hotel. The hotel there involved was an apartment hotel in which each apartment contained bath, kitchenette and dinette facilities. Many of its guests were permanent. The Housing Expediter argued that as used in the Housing and Rent Act of 1947 "hotel" means a place where transients are lodged and where there is no provision for individual cooking in rooms. The court rejected the Expediter's theory and referred to a Congressional Committee Report which indicated that since by the terms in effect immediately prior to enactment of the 1947 Act transient hotels were excluded from control, the language used in the 1947 Act was intended to extend the exclusion to hotels catering to permanent guests.

As a matter of fact, as the court pointed out, the Housing Expediter himself had issued an interpretation of Sec-

tion 202(c) ". . . 'hotel' is interpreted to include all types of hotels, such as transient hotels, residential hotels, apartment hotels, or family hotels." Upon the legislative history and the plain language of the act the court held that the fact that the accommodations included kitchenette and dinette facilities in no way removed the building from the category of hotels exempted from rent control.

Appellant characterizes the services rendered by the owners of the hotel here involved as "meager." Reference too is made to the fact that in 1947 the local office of the Housing Expediter issued orders which indicated that the property was still under rent control. As to the latter the unjustified position of the Housing Expediter is discussed by the Court of Appeal in the *Woods* case. Thus it was pointed out that upon the enactment of the 1947 Act the Housing Expediter took the position that in order to be within the definition of "decontrolled housing accommodations" as a hotel the establishment must have provided *all* of the services mentioned in the act. When the bill was up for renewal in 1948 the Congressional debates clearly indicated that Congress did not intend by the 1947 Act that only hotels offering all of the mentioned services would be decontrolled. For example, Senator Caine said, ". . . it was not intended (by the 1947 Act) that the failure to provide a telephone service or a bellboy would necessarily prevent an establishment from being decontrolled."

It is clear therefore that upon the evidence in this case that the premises were known as the Rilla Hotel, were operated as a hotel, and hotel type services were furnished to the guests, the finding that the premises were known and operated as a hotel finds ample support in the record.

III.

The Court's Conclusion That There Was No Violation of the Rent Control Act or Regulations in the Sale of the Furniture Is Supported by the Findings and Required by the Evidence.

It is interesting to review the background of Mrs. Bray's conduct before entering into the transaction complained of in this action.

Long before she met Mr. Peck she was the owner and operator of a boarding house. She leased this boarding house to a Mr. Romich and as a condition of executing the lease required him to purchase the furniture for $1000.00 [Tr. Vol. II, p. 49, line 21, to p. 50, line 6].

During the weeks immediately preceding the opening of negotiations upon the Rilla Hotel the plaintiff had employed Mr. Robert A. Smith of the Fitzpatrick Realty Company to negotiate for her the lease of certain premises on Elden Street for $200.00 per month and to purchase the furniture located on those premises for $6000.00 [Tr. Vol. II, p. 29, lines 1 to 11; Deft. Ex. E]. During the course of her negotiations on the Elden Street property, her agent Mr. Smith, saw the defendant's property offered for sale under the classification "Hotels for Sale" and went to see that property. When the Elden Street transaction fell through he spent some considerable time persuading the defendant to agree to the same type of transaction as the plaintiff was attempting to negotiate on the Elden Street property. It was plaintiff's agent Mr. Smith, who established the terms of the transaction. He suggested the rental and he suggested the purchase price of the furniture [Tr. Vol. II, p. 104, line 2, to p. 105, line 18].

In this connection it may be borne in mind that the plaintiff was in the business of operating boarding or rooming houses while plaintiff had never had any experience along similar lines [Tr. Vol. II, p. 29, lines 17 to 24; p. 79, lines 10 to 13].

It is obvious, therefore, that the overwhelming weight of the evidence supports the court's finding that the defendant did not require the plaintiff to purchase the furniture as a condition of renting or leasing the premises involved but that the offer came from the plaintiff and was accepted by the defendant.

It was appellant's burden to establish by a preponderance of the evidence that the defendant required the plaintiff to purchase the furniture as a condition of renting the property in question *in order to evade the requirements* of the Housing and Rent Act of 1947 and the regulations.

The first obstacle to be overcome by appellant in order to support her contention is the uncontroverted fact that all of the parties in May of 1948 were dealing with this property as a decontrolled hotel. The first time Mr. Smith mentioned the property to appellant he told her it was a decontrolled hotel [Tr. Vol. II, p. 39, lines 16 to 19]. Mr. Peck believed it was a decontrolled hotel. Under these circumstances it cannot be contended that even if the appellant's testimony that defendant stated he would not consider renting the place unfurnished had been accepted by the court as true there was any intent to evade the rent control act or the rent regulations.

Appellant places much emphasis upon the testimony of its witness that the market value of the furniture was only $850.00. As explained by Mr. Smith, in buying and

selling hotel properties the primary consideration is the amount of income being produced as a going business. He, therefore, taking into consideration the fact that the gross income from the Rilla Hotel was over $500.00 per month, established the rental of $175.00 per month for the real property and $7000.00 as the purchase price of the furniture as a reasonable consideration for acquiring the Rilla Hotel as a going business. Under these facts it is absolutely immaterial what the furniture might have been sold for piece by piece or what it might have been purchased for piece by piece.

In the case of *Porter v. Jorgensen* (1946, S. D. Cal., Yankwich), 63 Fed. Supp. 13, the defendant ran an ad reading "Now vacant. Will rent five-room house to party buying furniture $950.00. Rent $26.00. 4121 - 29th Street." The defendant did not obtain the consent of the O.P.A. to sell the furniture. The tenant resold most of the furniture, obtaining the sum of $200.00. The court held that the evidence was not sufficient to show a "tie-in" sale evasive of the rent regulations.

Finally, even the testimony offered on behalf of appellant herself would not, assuming the court had accepted it as true, establish her contention. This testimony was simply that the defendant was asked if he would consider renting the place unfurnished. There was no testimony that he was asked whether he would consider renting the place furnished but without requiring the appellant to purchase the furniture. She did not offer to rent it furnished at an increased rental rather than to rent it and buy the furniture. In this state of the record the court, even had it accepted appellant's testimony as true, could not have made a finding that the transaction was in violation of the act.

IV.

Appellant's Motion for a New Trial Was Properly Denied by the Trial Court.

Preliminarily it should be pointed out that the motion for new trial insofar as it was based upon newly discovered evidence was not supported by the affidavit of the party and by the affidavit of the attorney showing that the evidence was in fact newly discovered and why it could not with reasonable diligence have been produced at the trial and what diligence was used. These affidavits are required by *Rule 17(3)* of the Rules of the District Court of the United States for the Southern District of California.

The failure to file such affidavits constitutes a waiver by the moving party of the motion. *Local Rule 3(d).* The motion did not specify a particular error or errors in law relied upon nor did it specify the particulars wherein the evidence was claimed to be insufficient. Accordingly the trial court would have been justified in disregarding each of these two grounds. *Local Rule 17(b)(1).*

Apart from technical objections which alone justified the denial of the motion the court properly denied the motion based upon the substance of the grounds urged.

The appellant was not taken by surprise by the contention that the premises in question were decontrolled housing accommodations by virtue of being a hotel. As she herself testified when she first heard of the property from her agent Mr. Smith she was told that the establishment was a decontrolled hotel. This was also told her by Mr. Peck. Accordingly she knew all along that the property was a decontrolled hotel and that the transaction entered into was not subject to rent control for that reason.

The appellant did not object to the introduction of evidence concerning the hotel type services furnished by the defendant on the ground that such evidence was not within the issues framed by the pleadings nor that she was taken by surprise. Nor did she request an adjournment to afford her the opportunity to produce evidence.

Finally, on the basis of the affidavits and counter-affidavits submitted on the motion for new trial, it is at once apparent that all that was sought to be offered upon a new trial was the evidence of witnesses whose testimony would be controverted by other witnesses. The court properly exercised its discretion in weighing the conflict of evidence which would be before it upon the receipt of such testimony and it must be presumed that in passing upon the motion for new trial and considering the affidavits before it the court determined that should each of the witnesses testify as indicated in the affidavits the court's finding of fact would remain the same and be adverse to the appellant on the issue presented. Accordingly the trial court's denial of the motion was a proper exercise of its discretion and should not be disturbed.

Conclusion.

It is obvious that the appellant entered into this transaction knowing that the premises were decontrolled and operated as a hotel within the meaning of the Housing and Rent Act of 1947. She knew that the income from the property being in excess of $500.00 per month it was very profitable for her to lease the property for $175.00 and purchase the furniture for $7000.00 in order to take possession of the hotel as a going business. If it were not for the fact that after taking possession

of the premises she became greedy, this case would never have found its way into the court. The first thing she did was spend some $350.00 upon the rooms over the garage and then raised the rent to $90.00 a month for those rooms. She at once began reducing and eliminating the hotel type services. First of all she cut out the daily cleaning service [Tr. Vol. II, p. 54, lines 10 to 15]. She then cut out the telephone service [Tr. Vol. II, p. 54, line 21, to p. 55, line 9]. This, of course, caused tenants to become dissatisfied and some of them obviously not knowing that the premises were decontrolled as a hotel complained to the housing expediter. No doubt upon investigation and finding that the services customarily provided by a hotel were not being given the office of the housing expediter reached the conclusion that the property was not a hotel and held Mrs. Bray responsible.

The conduct of Mrs. Bray may be summarized as follows: First, she induced Mr. Peck to execute the lease and sell her the furniture on her own terms despite the fact that he had planned to make an outright sale of the hotel. Second, she then began raising rents and eliminating and reducing services which accomplished two results, the increasing of her own net income and the removal of some of the characteristics of the establishment as a hotel, Third, she then consented to the entry of a small judgment for over-charge of rent against her. Whether or not all of this was the result of a preconceived plan on her own part to subject Mr. Peck to an enormous liabil-

ity to her, it is unnecessary to determine. She must not be permitted to take advantage of her own wrongdoing.

The defendant having established that the property was a decontrolled hotel within the meaning of the Housing and Rent Act of 1947 as amended and the regulations issued thereunder the judgment of the court below should be affirmed.

Respectfully submitted,

PERRY BERTRAM,

Attorney for Appellee.